



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU



## **RESEARCH APPENDIX -** **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Added To File: 03/06/2003 (Per: JK)



☞ The drafting file for 2003 LRB -0646/P2

has been copied/added to the drafting file for

## **2003 LRB -2028**

☞ The attached 2003 draft was incorporated into the new 2003 draft listed above. For research purposes, this cover sheet and the attached drafting file were copied on yellow paper (darkened - auto centered - reduced to 90%), and added, as a appendix, to the new 2003 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

☞ This cover sheet was added to rear of the original 2003 drafting file. The drafting file was then returned, intact, to its folder and filed.

**2003 DRAFTING REQUEST****Bill**

Received: 11/12/2002

Received By: jkreye

Wanted: Soon

Identical to LRB:

For: Administration-Budget

By/Representing: Koskinen

This file may be shown to any legislator: NO

Drafter: jkreye

May Contact:

Addl. Drafters:

Subject: Tax - sales

Extra Copies:

Submit via email: YES

Requester's email:

Carbon copy (CC:) to: joseph.kreye@legis.state.wi.us  
sherrie.gates-hendrix@dor.state.wi.us**Pre Topic:**

DOA:.....Koskinen - BB0368,

**Topic:**

Streamlined sales tax

**Instructions:**

See Attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	jkreye 12/13/2002	kgilfoy 01/02/2003	pgreensl 01/02/2003	_____	sbasford 01/02/2003		
	jkreye 01/21/2003	kgilfoy 01/24/2003		_____			
/P2			pgreensl	_____	lemery		S&L

01/27/2003 12:07:32 PM

Page 2

**LRB-0646**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
			01/27/2003 _____		01/27/2003		Tax

FE Sent For:

<END>

**2003 DRAFTING REQUEST****Bill**

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Received By: jkreye

Wanted: Soon

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By/Representing: Koskinen

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/P1	jkreye 12/13/2002	kgilfoy 01/02/2003	pgreensl 01/02/2003	_____	sbasford 01/02/2003		
	jkreye 01/21/2003	kgilfoy 01/24/2003		_____			
/P2			pgreensl	_____	lemery		S&L

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
			01/27/2003 _____		01/27/2003		Tax

FE Sent For:

<END>

**2003 DRAFTING REQUEST**

**Bill**

Received: **11/12/2002**

Received By: **jkreye**

Wanted: **Soon**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Koskinen**

This file may be shown to any legislator: **NO**

Drafter: **jkreye**

May Contact:

Addl. Drafters:

Subject: **Tax - sales**

Extra Copies: *KMG*

Submit via email: **YES**

Requester's email:

Carbon copy (CC:) to: **joseph.kreye@legis.state.wi.us**  
**sherrie.gates-hendrix@legis.state.wi.us**

**Pre Topic:**

DOA:.....Koskinen - BB0368,

**Topic:**

Streamlined sales tax

**Instructions:**

See Attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/P1	jkreye 12/13/2002 jkreye	kgilfoy 01/02/2003	pgreensl 01/02/2003	<i>1/16/03</i>	sbasford 01/02/2003		
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*p2-1/22/03  
tmg*  
*1/16/03  
pg*  
*p81  
cpn  
gt*

FE Sent For:

<END>

**2003 DRAFTING REQUEST**

**Bill**

Received: 11/12/2002

Received By: jkreye

Wanted: Soon

Identical to LRB:

For: Revenue

By/Representing: sherrie

This file may be shown to any legislator: NO

Drafter: jkreye

May Contact:

Addl. Drafters:

Subject: Tax - sales

Extra Copies:

Submit via email: YES

Requester's email: sherrie.gates-hendrix@legis.state.wi.us

Carbon copy (CC:) to: joseph.kreye@legis.state.wi.us

---

**Pre Topic:**

No specific pre topic given

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**Topic:**

Streamlined sales tax project

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**Instructions:**

See Attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	jkreye 12/13/2002	kgilfoy 01/02/2003	pgreensl 01/02/2003	_____	sbasford 01/02/2003		

FE Sent For:

<END>

**2003 DRAFTING REQUEST**

**Bill**

Received: **11/12/2002**

Received By: **jkreye**

Wanted: **Soon**

Identical to LRB:

For: **Revenue**

By/Representing: **sherrie**

This file may be shown to any legislator: **NO**

Drafter: **jkreye**

May Contact:

Addl. Drafters:

Subject: **Tax - sales**

Extra Copies:

Submit via email: **YES**

Requester's email: **sherrie.gates-hendrix@legis.state.wi.us**

Carbon copy (CC:) to: **joseph.kreye@legis.state.wi.us**

**Pre Topic:**

No specific pre topic given

**Topic:**

Streamlined sales tax project

**Instructions:**

See Attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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FE Sent For:

1/p1-12/20  
Xmg  
1/2/03  
p8  
1/2/03  
<END>  
p8/UE



**Kreye, Joseph**

---

**From:** Gates-Hendrix, Sherrie  
**Sent:** Friday, December 13, 2002 9:35 AM  
**To:** Kreye, Joseph  
**Subject:** SST draft

Hi Joe --

Could you add to the streamlined draft some language on costs...

Specifically, we'd like to add 2 things:

- Funding of \$25,000 under 20.566(1)(a) to fund Wisconsin's portion of the administrative costs incurred by the streamlined sales tax governing body for administering the SST agreement.
- Add language to s. 77.63 indicating that a seller or certified service provider that uses tax collection software certified by the streamlined sales tax governing body may retain a portion of the tax revenues collected to cover collection costs. The portion of revenues which may be retained would be determined by the department of revenue in conjunction with contracts negotiated by the streamlined sales tax governing body.

I hope this last piece of language is workable. It's really a placeholder at this point. Call if I can clarify anything.

thanks

Sherrie  
7-1262

## Kreye, Joseph

---

**From:** Koskinen, John  
**Sent:** Thursday, January 16, 2003 9:25 AM  
**To:** Schaeffer, Carole; Kreye, Joseph  
**Subject:** RE: SST draft comments

The Agency is Revenue (566). The title should be "Streamlined Sales Tax."

-----Original Message-----

**From:** Schaeffer, Carole  
**Sent:** Thursday, January 16, 2003 9:11 AM  
**To:** Kreye, Joseph; Koskinen, John  
**Subject:** RE: SST draft comments

I can assign it BB0368 for tracking purposes. John, what is the agency/agency number for this draft, and what should I title it?

Thanks,  
Carole S.

-----Original Message-----

**From:** Kreye, Joseph  
**Sent:** Thursday, January 16, 2003 9:08 AM  
**To:** Koskinen, John  
**Cc:** Schaeffer, Carole; Gates-Hendrix, Sherrie  
**Subject:** RE: SST draft comments

John,

Is there a budget request number that corresponds to this draft (for tracking purposes)?

Thanks

**Joseph T. Kreye**  
Legislative Attorney  
Legislative Reference Bureau  
(608) 266-2263

-----Original Message-----

**From:** Koskinen, John  
**Sent:** Thursday, January 16, 2003 9:06 AM  
**To:** Kreye, Joseph  
**Cc:** Schaeffer, Carole; Gates-Hendrix, Sherrie  
**Subject:** RE: SST draft comments

Consider this a formal request to convert the /2 draft of the Streamlined Sales Tax proposal to a budget draft.

-----Original Message-----

**From:** Kreye, Joseph  
**Sent:** Thursday, January 16, 2003 9:00 AM  
**To:** Gates-Hendrix, Sherrie  
**Cc:** Koskinen, John  
**Subject:** RE: SST draft comments

FYI: I have yet to receive a formal request from John regarding this draft, so until I do, I'll treat it as a revenue draft, not as a budget draft.

**Joseph T. Kreye**  
Legislative Attorney

## Kreye, Joseph

From: Gibbons, Vicki L  
Sent: Monday, December 02, 2002 4:24 PM  
To: Kreye, Joseph  
Cc: Gates-Hendrix, Sherrie; Hardt, Diane L  
Subject: RE: Questions regarding SSTP

Hi Joe,

1. I think the information on leases in 77.51(14)(j) and 77.72(2), should be removed and replaced with the new language as we did for the other sourcing language.

(A). "Transportation equipment" means any of the following:

1. Locomotives and railcars that are utilized for the carriage of persons or property in interstate commerce.
2. Trucks and truck-tractors with a Gross Vehicle Weight Rating (GVWR) of 10,001 pounds or greater, trailers, semi-trailers, or passenger buses that are:
  - a. Registered through the International Registration Plan; and
  - b. Operated under authority of a carrier authorized and certificated by the U.S. Department of Transportation or another federal authority to engage in the carriage of persons or property in interstate commerce.
3. Aircraft that are operated by air carriers authorized and certificated by the U.S. Department of Transportation or another federal or a foreign authority to engage in the carriage of persons or property in interstate or foreign commerce.
4. Containers designed for use on and component parts attached or secured on the items set forth in subsections (D)(1) through (D)(3).

1. The direct mail sourcing includes reversing J.C. Penney and that is what I assume your are referring to with your reference to 77.51(22). We had a prior LRB (5051) on the subject that I think you can use taking into account the attached comments.



5051 JC  
Penney.doc

*applies to a direct mail form under s. 77.522(1)(a)1, exemption form under s. 77.522(1)(a)2, a resale certificate (under s. 77.52(13))*

2. North Carolina has a law on penalty for giving an incorrect exemption certificate. Here is a summary I got from CCH

*vague*  
A penalty of \$250 will be imposed as an additional tax for misuse of a certificate of resale by a purchaser. ( Sec. 105-236(5a), G.S., ¶193-208) In addition, a purchaser who misuses a certificate of resale is subject to assessment of the penalties set out in Sec. 105-236(5), G.S. (see "General--Understatement," below) and may be guilty of a Class I felony. ( Sec. 17:07B.0106, N.C. Adm. Code, ¶164-006) The penalty is applicable only once to each invoice or bill of sale with respect to which a misuse has occurred. Effective January 1, 2001, these rules apply to other exemption certificates as well, including a direct pay certificate and a farmer's certificate.

3. I am not at all to sure about funding mechanisms. I think we may have to talk to Diane Hardt about that.

I am willing and able to meet on Friday. Sherri would also like to be involved in those meetings and she is available until 2:15. If that is not convenient, we could possibly meet Thursday morning. Just let me know.

Vicki L. Gibbons

Wisconsin Department of Revenue  
Mail Stop #6-40  
P.O. Box 8933  
Madison, WI 53708  
(608) 266-3873  
[vgibbons@dor.state.wi.us](mailto:vgibbons@dor.state.wi.us)

-----Original Message-----

**From:** Kreye, Joseph  
**Sent:** Tuesday, November 26, 2002 3:42 PM  
**To:** Gibbons, Vicki L  
**Cc:** Gates-Hendrix, Sherrie  
**Subject:** Questions regarding SSTP

Hi Vicki:

I've hit a brick wall regarding the SSTP draft. In other words, I've gotten to the more complicated changes and I'm not sure how to proceed. The following is a list of questions, some specific and some general, that I will need answers to in the weeks to come. I can make myself available for an in-person meeting to discuss the more complex issues:

1. I received the information regarding leases. How should I change current law to conform to the adopted proposal regarding leases (i.e., should I repeal the existing provisions and create new text consistent with the proposal)? The adopted proposal also mentions "transportation equipment (as defined)" but, as far as I can tell, provides no definition for "transportation equipment." Is there one and, if there is, what is it?
2. I've added the provisions related to direct mail but I don't know how to amend s. 77.51 (22) to conform to those changes.
3. The instructions indicate that I should add a penalty for misuse of exemption certificates. What is it?
4. The instructions indicate that DOR should have funding for its share of administrative costs. Consequently, I need to create an appropriation to cover that. Should it be a sum sufficient to cover such costs or do you have an amount in mind?
5. It would help me a lot to talk to you, at length, about the provisions related to CSPs/Bonds, new bad debt related procedures, and monetary allowances. Those are the areas for which I am having the most difficulty conceptualizing. I'd be happy to drive out to Revenue sometime next week (or whenever) to talk.

Thanks for your help.

Joe

**Joseph T. Kreye**  
Legislative Attorney  
Legislative Reference Bureau  
(608) 266-2263

**Kreye, Joseph**

---

**To:** Gibbons, Vicki L  
**Cc:** Gates-Hendrix, Sherrie  
**Subject:** Questions regarding SSTP

Hi Vicki:

I've hit a brick wall regarding the SSTP draft. In other words, I've gotten to the more complicated changes and I'm not sure how to proceed. The following is a list of questions, some specific and some general, that I will need answers to in the weeks to come. I can make myself available for an in-person meeting to discuss the more complex issues:

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2. I've added the provisions related to direct mail but I don't know how to amend s. 77.51 (22) to conform to those changes.
3. The instructions indicate that I should add a penalty for misuse of exemption certificates. What is it?
4. The instructions indicate that DOR should have funding for its share of administrative costs. Consequently, I need to create an appropriation to cover that. Should it be a sum sufficient to cover such costs or do you have an amount in mind?
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Thanks for your help.

Joe

**Joseph T. Kreye**  
Legislative Attorney  
Legislative Reference Bureau  
(608) 266-2263

**Kreye, Joseph**

---

To: Gates-Hendrix, Sherrie  
Cc: Gibbons, Vicki L.  
Subject: SSTP

Sherrie,

I received your "instructions" related to the SSTP. I am still in the process of digesting the material. Last session, I produced a drafts based on an outline, or rough draft, prepared by Vicki. It may be useful for me again this session if Vicki prepares a "guide" for me to follow as to what needs to be amended and how. For purposes of definitions and other substantive changes, I may work off one of last year's drafts, 01-2416/P1. Please let me know if this is a practical way to proceed. Thanks.

As a preliminary matter, I noticed that several of the definitions proposed by the project include language related to taxing certain products differently than others. That language, however, does not belong in a definition as it relates to policy and, specifically, to the administration of the Act. In fact, I'm not sure it belongs in the statutes, except, perhaps, as an amendment to the Act passed last session. In any case, I cannot put it in the definitions. Also, please note that I cannot create a definition for inclusion in the statutes unless I use the definition in the statutes. I haven't read the materials thoroughly enough to know if this is going to be a problem, but I anticipate that it may be. Please let me know if you have any questions.

**Joseph T. Kreye**  
Legislative Attorney  
Legislative Reference Bureau  
(608) 266-2263

*still need definitions for "direct mail"  
"rewritten computer software"*

*see 77.54(14) & (14g)  
— need to use "slung" as  
defined by project*

*make sure sourcing rules are consistent w/ Telecom rules  
bad debt provisions*

**Kreye, Joseph**

---

**From:** Gates-Hendrix, Sherrie  
**Sent:** Tuesday, November 12, 2002 8:54 AM  
**To:** Kreye, Joseph  
**Subject:** SST summary/outline

Joe -- Here's the SST summary Vicki G prepared.

I've highlighted in red a issue related to durable medical equipment that we have not made a final decision on. I think it may be for the next administration to decide. For this issue, could you repeal the current exemptions and create a new one that relates to the SST definition of durable medical equipment and mention in a drafter's note that we talked about the fact that no final decision has been made on that issue?

Thanks -- let me know if you need anything else on this (or call Vicki with questions 6-3873)

Sherrie



SST Sum & Stat  
Changes.doc

**Kreye, Joseph**

---

**From:** Gates-Hendrix, Sherrie  
**Sent:** Tuesday, September 24, 2002 5:09 PM  
**To:** Kreye, Joseph  
**Subject:** FW: Agreement



September Meeting  
Working Draf...

Hi Joe --

FYI, here's the final drafting piece on the Streamlined Sales Tax project. I believe from all signals that DOA will put it in the Gov's budget. If not, we will certainly ask to have it put in later. I will send it to John Koskinen too, so he may send it over to you.

Could you also prepare a separate draft for DOR?

Hope all is going well so far on budget drafts. I'm sure it will get worse (always does). But you'll be solving the state's fiscal crisis, right?

thanks,

Sherrie



# **DIVISION ANALYSIS OF LEGISLATION (Form 1)**

Fiscal Note Analysis? Yes ☒ No ☐

email completed copies to:  
Sherrie Gates-Hendrix (Sec Office)  
[Rpfsn@dor.state.wi.us](mailto:Rpfsn@dor.state.wi.us)

Division: IS&E

For Division Use:

Assigned to: <b>Vicki Gibbons</b>	Date: <b>April 1, 2002</b>	Due Date:
Prepared by: <b>Vicki Gibbons</b>	Date: <b>April 2, 2002</b>	(analysis should generally be prepared within 1 week of assignment)
Reviewed by:	Date:	

1. **Bill and/or LRB Number:** 2002 LRB 5051/P1 – Amend Definition of Use to Reverse *Horne Directory* and *J.C. Penney* Decisions

2. **Type of Taxes Affected:** (please list all that apply)

Sales and Use

3. **Description of the Bill:** (briefly describe the subject matter of the bill and the change/s)

This bill amends the definition of use by defining “exercise any right or power over tangible personal property or taxable services” to include selecting recipients, determining mailing schedules, or otherwise directing the distribution, dissemination or distribution of tangible personal property or taxable services, regardless of whether the purchaser of such property owns or physically possesses the property.

4. **Statutory language problems, if any:**   X   Yes        No

(If yes, describe problems and indicate suggested corrective language. Example of problem: The bill language is unclear, does not fully accomplish the desired result, or has undesirable side effects.)

The analysis should indicate that the creation of sec. 77.51(22)(bm), together with sub. (22)(a) and (b), reverses the Wisconsin Supreme Court decision in *Department of Revenue v Horne Directory* (105 Wis. 2d52, 1981) and later decisions relying on that decision (e.g. *J.C. Penney Company, Inc., et al. v. Wisconsin Department of Revenue* (Case No. 84-CV-3978, May 21, 1985)).

Upon further review of the previous Wisconsin *J.C. Penney* decisions and the U.S. Supreme Court decision in *D.H. Holmes*, I think it is necessary in the new definition to make it absolutely clear that “use” in Wisconsin includes the distribution of tangible personal property in Wisconsin, even though the purchaser does not have possession of the property. Therefore, I ask that line 3 of the draft be changed by inserting “distribution” after “includes and before “selecting.” It is not just directing the distribution that will be “use” but also the actual distribution in Wisconsin. It is likely that selecting the distribution may be outside Wisconsin.

5. **Effective date problems, if any, including transitional problems:**        Yes   X   No  
(If yes, describe problem and suggested effective date or transitional language needed.)

**Streamlined Sales Tax Project**  
**Proposed Revision to Uniform Sourcing Rule for Leases and Rentals**

The existing sourcing rule changes the practice of a majority of states as it relates to leasing tangible personal property. Project subgroups and industry representatives have proposed a revision to the sourcing rule attached as Exhibit A. The Steering Committee and the Subgroups recommend this revision. This revision provides uniformity for a greater number of transactions and has the consensus of industry representatives.

**Option I. Adopt proposed revision to Uniform Sourcing Rules attached as Exhibit A:**

- A. The proposed revision to the sourcing rules differentiate sourcing of retail sales from leases or rentals. The proposed rules distinguish between vehicles and aircraft, Transportation Equipment (as defined) and other tangible personal property that may be leased or rented. The effect of these sourcing provisions is to source leases or rentals consistent with the way that a majority of states source these transactions now, and to maintain status quo and provide uniformity with respect to these transactions.
- B. Sales of vehicles and aircraft are still excluded from rules and still sourced according to state law. However there is a uniform sourcing rule for leases or rentals of vehicles and aircraft that sources the payments to the location of the property (garage for vehicle and hangar for aircraft).
- C. Sales, lease and rentals of watercraft, mobile, manufactured and modular homes are excluded from rules and still sourced according to state law. This may be an issue to address in the future.
- D. Leases or rentals of general tangible personal property: The first payment is sourced at the delivery location. If property is subsequently moved, periodic payments are sourced to the property's location. Thus, if a copier is leased and originally delivered in Tennessee, the lease is originally sourced to Tennessee. If the copier is moved to Kentucky, the payments made after the property is moved are sourced to Kentucky. *defined where?*
- E. Sales, leases and rentals of Transportation Equipment (as defined) are sourced as a retail sale of a product. In effect, these transactions will be sourced at the delivery location. Most states have exemptions for property used in interstate commerce. This sourcing rule has no impact on the taxability or exemption of this type of property. The rule merely defines what the seller or lessor's obligations are with respect to collection of any applicable sales or use tax. This rule recognizes the unique nature

*The lease or rental of a vehicle or aircraft occurs at the location where the property is to be used or stored.*

of property used in interstate commerce because this property has no regular situs. As with all of the sourcing rules, this provision does not affect any use tax obligation of the purchaser or lessee of Transportation Equipment.

**Option II. Leave existing sourcing language the way it has been adopted:**

- A. Leases will be sourced to the jurisdiction where property is delivered for the life of the lease.
  - 1. This could lead to significant tax planning such that lessees take possession in a no sales tax state. Lessors then have no collection obligation with regard to sales tax on the lease. Lessees would have use tax burden of state where property is moved.
  - 2. Lessors advise that this will cause major administrative hardship because their systems cannot track the location of property for billing purposes and maintain the situs where property originally delivered.
  - 3. This is inconsistent with the way that a majority of states source lease transactions today.
- B. Sales (including lease or rental) of motor vehicles, aircraft, watercraft, mobile and modular homes are omitted and will be sourced according to laws of state.

**Option III. Adopt sourcing language on leases of general tangible personal property (subsection B of proposed language) and exclude sale, lease or rental of motor vehicles, aircraft, watercraft, modular and mobile homes.**

- A. This would leave significant uncertainty on excluded items, especially as they relate to the automobile leasing industry and the transportation industry. This would leave a gaping hole in how to source a very large number of transactions.
- B. It is common to lease items separately on certain vehicles and aircraft. An airplane used in interstate commerce would be omitted from the sourcing rules, but the avionics equipment separately leased and used on the aircraft would be included in the rules. How would the lessor track the avionics equipment? Would lessors now have to track trailers and semi-trailers (considered vehicles but not motor vehicles) and railcars and locomotives? Lessors do not now track them now.

In light of the foregoing, the Steering Committee and the Leasing and Sourcing subgroups recommend adoption of the proposed revisions to the Uniform Sourcing Rule.

## Kreye, Joseph

---

**From:** Gibbons, Vicki L  
**Sent:** Monday, November 18, 2002 1:10 PM  
**To:** Kreye, Joseph  
**Subject:** FW: Amendments

Joe,

See e-mail below for changes made to sourcing rules for direct mail and leasing.

Also attached are the papers on the subject.



direct mail paper    Lease Sourcing  
10-31-02.doc... Recommendation....

Vicki L. Gibbons  
Wisconsin Department of Revenue  
Mail Stop #6-40  
P.O. Box 8933  
Madison, WI 53708  
(608) 266-3873  
[vgibbons@dor.state.wi.us](mailto:vgibbons@dor.state.wi.us)

-----Original Message-----

**From:** Hardt, Diane L  
**Sent:** Monday, November 18, 2002 11:17 AM  
**To:** Gibbons, Vicki L  
**Subject:** Amendments

Here are the amendments made in Chicago. In addition, there were a few smaller amendments that are being drafted. The most significant were:

309 C line 26. Remove "or other information"

311 These definitions are only for section 309

805 and other similar places: make it "state's laws, rules, regulations, and policies"

Appendix C, Definition of "sales price"--allow states to exclude from sales price any credit allowed for trade-ins



UNIFORM      Direct mail      Sections 309 310  
SOURCING RULES - Amendment 103102.d    revisions.do...

Diane L. Hardt  
Administrator, Division of Income, Sales & Excise  
Wisconsin Department of Revenue  
P.O. Box 8933  
Madison, WI 53708-8933  
(608) 266-6798  
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## **STREAMLINED SALES TAX PROJECT**

### **SOURCING DIRECT MAIL**

(October 31, 2002)

#### **Issues**

1. Should the sourcing rules adopted by SSTP be modified to simplify sourcing of direct mail transactions?
2. If yes, how should "direct mail" be defined?

#### **Background**

For purposes of the following discussion only, "direct mail" refers to items delivered or distributed to a mass audience or to a mailing list provided at the direction of the customer when the cost of the items are not billed directly to the recipients. "Direct mail" does not include bulk shipments of items to a single address.

Under the SSTP sourcing rules, items are sourced in the following order depending on the information available to the seller:

1. To the seller's location for over-the-counter sales.
2. To the location known to the seller where the purchaser or the purchaser's donee receives the item. Possession by a carrier on behalf of the purchaser does not constitute receipt.
3. To the business address of the purchaser (e.g. billing address), unless use of this address is in bad faith.
4. To any other address the seller has for the purchaser, unless use of this address is in bad faith.
5. When none of the above apply: (e)
  - If tangible personal property, the address from which the item is shipped,

- If a digital good, the address from which the digital good was first available for transmission by the seller, or
- If a service, the address from which the service was provided.

Direct mail cannot, by definition, be sourced under Rule 1.

There is uncertainty about whether Rule 2 applies to sellers of direct mail. Printers note that although the customer provides a mailing list of addresses to the seller (printer), the printer does not retain sufficient information that would allow sourcing to the destination location, especially with the enormous number of local jurisdictions. Some may interpret the fact that the printer has the mailing list, for the sole purpose of printing addresses on the printed material, constitutes knowing the ultimate destination of the mailings.

The printers have stated that, generally, the mailing list is proprietary information of their customer. Due to the sensitive nature of this data and because large printers print for multiple customers who may be competitors, they are not allowed to keep the mailing lists or documentation of the list once the printing job is completed. In most instances, they do not keep any record of where the items printed are ultimately mailed.

Some may argue that if a printer must properly sort the items for mailing under postal regulations, it must know the destination of each item of direct mail. The customer, in order to achieve the greatest savings in postage, often will sort the mailing list and that determines the sort done by the printer in readying the printed material for mailing. In some cases, the printer presorts the mailing for the customer, using a canned software package that sorts the mail into categories, to get the best postage rate. This may be down to the level of a mail carrier route, but recent changes in the postal rates make this sort less attractive. Printers have indicated that the software used for sorting is for postal delivery routes and is not tax effective for determining tax jurisdictions.

Since the printer does not retain the mailing list they do not have information available at the time of audit to verify where products or services relating to direct mail were sold. If everyone can agree that the printer does not know, or cannot reasonably be expected to know, where the items are shipped, Rule 2 does not apply.

**Note:** In early discussions of the general sourcing rules, drafters of the sourcing rules were concerned that since a printer has general knowledge that direct mail goes to multiple taxing jurisdictions, dropping to Rule 3 or Rule 4 constitutes "bad faith." That would require use of Rule 2 by sellers of direct mail, which may be impossible for the seller to properly administer. However, authors of this paper believe that general knowledge of multi-jurisdiction deliveries does not constitute "bad faith" for purposes of Rule 3 or 4.

If Rules 1 and 2 do not apply, the next default would be Rule 3. The seller would source the transaction to the customer's address. Printers agree that they will always have an address for their customer (billing or some other address). Generally, this is going to be the "Bill To" address of the customer. However, the states have a concern of defaulting to this rule. This is an address that the seller can control to obtain favorable tax treatment. However, the state of the billing address may in no way be affected by the transaction (i.e., the seller is not located there and the direct mail may never be delivered in that state).

If Rule 3 were not acceptable, Rule 4 would also not be acceptable, as this is some other address of the customer that the seller may have, such as an address for the payment instrument. The remaining default left to consider is Rule 5, which is the location from where the property was shipped.

**Example:** Printer A (located in New Jersey) is hired by Customer B (located in South Dakota) to print 500,000 catalogs. Customer B provides a mailing list in label form to Printer A. Customer B, to achieve the greatest savings in postage, has sorted the mailing list. Printer A prints the catalogs, packages them pursuant to U.S. Postal Service regulations, and affixes a mailing label to each catalog. The catalogs, as sorted by the customer, are put on pallets and delivered to the nearest U.S. Postal Service facility. Very often, the Postal Service facility is located at the printer's facility. If not at the printer's facility, either the U.S. Postal Service or a common carrier will transport the printed materials from the printer's facility to a Bulk Mail Facility or other postal facility. The U.S. Postal Service delivers the catalogs to addresses in 10 eastern states that have a sales tax.

Using Rule 2 to source direct mail requires the printer to know the exact destination for each of the 500,000 catalogs that are shipped in order to properly collect sales or use tax. In the event of an audit of the printer, information would not be available to taxing jurisdictions to verify the exact destination since the seller does not retain the mailing lists or documents detailing the destination addresses. There will be subjective questions by taxing jurisdictions about how much information a printer has with respect to the destinations of particular mailing and whether the seller may default to Rule 3 for purposes of sourcing the transaction. Using Rule 3 in the above example would require the seller to source the transaction to South Dakota, even though none of the catalogs go to that state. Using Rule 5, the printer would collect New Jersey tax on the transaction.

Purchasers have control and/or ownership of the information needed to correctly source direct mail to the specific taxing jurisdictions where they are delivered. Printers believe there are purchasers of direct mail, who would clearly prefer to handle the responsibility of correctly reporting tax to the jurisdiction where the direct mail is delivered and used. Several large retailers present at the Sourcing Workgroup meeting in Salt Lake City (07/02), where the direct mail issue was discussed, confirmed their willingness to handle this responsibility.

### **Alternatives to Consider**

#### ***Issue One — Should Sourcing Rules Be Modified for Direct Mail?***

1. Do not modify existing sourcing rules for direct mail sales.
2. Allow purchasers to use a Direct Mail Form relieving the seller of collecting tax on the transaction. If the purchaser does not use the Direct Mail Form for purchases of direct mail, the seller must source the transaction under Rule 3 (e.g., billing address).
3. Require that purchasers provide to the seller one of the following:
  - A Direct Mail Form, which would relieve the seller of collecting any sales or use tax on the transaction.



- Information as to the jurisdictions where the direct mail is delivered so that the seller may properly source the transaction.

If the purchaser fails to provide to the printer the Direct Mail Form or information on delivery jurisdictions, the seller will collect tax based on the location from where the direct mail was shipped (origin). The purchaser is still liable for tax in the state where the property is stored, used, or consumed based on existing state law. A state where the property is delivered will not be required to give credit to the purchaser for tax collected in the state of origin. For failing to provide the required information, the purchaser will have to go back to the state of origin for any tax collected by the seller.

4. Mandate use of a Direct Mail Form for purchases of direct mail thereby relieving the seller of collecting tax on any direct mail transactions.

#### ***Issue Two — Definition of Direct Mail***

1. Define direct mail as any tangible personal property delivered or distributed by U.S. Mail or other for-hire carrier to a mass audience or to a mailing list provided by a purchaser or at the direction of a purchaser if:
  - a. The addressee is not directly billed for the tangible personal property, and
  - b. Not more than one item of the tangible personal property is delivered to a single addressee.

**Examples:** Catalogs, brochures, billing invoices, and coupon booklets, product samples, promotional gifts provided with printed material, and holiday gifts, such as candy and gift baskets, with or without printed material.

2. Define direct mail as printed material delivered or distributed by U.S. Mail or other for-hire carrier to a mass audience or to a mailing list provided by a purchaser or at the direction of a purchaser if:
  - a. The addressee is not directly billed for the printed material, and
  - b. Not more than one package of the printed material is delivered to a single addressee.

**Examples:** Catalogs, brochures, billing invoices, calendars, and coupon booklets. If other items, such as product samples, are included in the package, the package is not direct mail for sourcing purposes.

3. Define direct mail as printed material, that may be in combination with other tangible personal property, delivered or distributed by U.S. Mail or other for-hire carrier to a mass audience or to a mailing list provided by a purchaser or at the direction of a purchaser if:
  - a. The addressee is not directly billed for the tangible personal property, and
  - b. Not more than one package of the tangible personal property is delivered to a single addressee.

Printed material will still be direct mail even though inserted with the printed material is other tangible personal property that has been purchased from a person other than the seller of the direct mail and supplied by the purchaser or another person at the direction of the purchaser to the seller of the direct mail.

**Examples:** Coupons or brochures with a sample of the product.

## Recommendation

### Issue One

Alternative 3 – Amend sourcing rules to require the use of the direct mail form by purchasers of direct mail or that they provide delivery information to the seller. If the purchaser does not provide the seller with the Direct Mail Form or delivery information, the seller of direct mail must collect tax under Rule 5.

### Issue Two

Alternative 3 – Limit direct mail to printed material. However, allow printed material to include tangible personal property supplied by the customer to the direct mail seller for inclusion in the package containing the printed material. This is consistent with the definition of direct mail adopted by the Implementing States in addressing an exclusion from delivery charges related to direct mail.

## Discussion of Alternatives (with reference to perspectives of the seller, purchaser, and states/SSTP)

### Issue One, Alternative One - Do not modify existing sourcing rules for direct mail sales

#### 1. Seller

- Lack of clarity in interpreting existing sourcing rules as they apply to direct mail. Does the printer use Rule 2 or Rule 3 where there is general knowledge, but no specific knowledge or documentation available for the destinations?
- It is impractical to require printers to circumvent business practices relating to proprietary mailing lists of customers in order for a seller to accurately apply a destination-sourcing rule.
- If the seller cannot ascertain the destination of direct mail, a Certified Service Provider, will not be in a position to determine the appropriate taxing jurisdiction either.

#### 2. Purchaser

- It may be easier for some purchasers to have the seller collect and remit to the place of destination.

- If the transaction defaults to the "Bill To" address, the purchaser may have difficulty in obtaining credit for tax paid from tax jurisdictions where the direct mail is actually stored, used, or consumed.
- Purchasers using multiple print vendors may encounter different interpretations of the sourcing rules, complicating their attempts to apply tax consistently and correctly.

### 3. State/SSTP

- Providing special sourcing rules for a specific product or industry may encourage further modifications in the sourcing rules that creates complexity.
- If destination can be ascertained, it is generally more efficient for states to collect from one seller rather than multiple purchasers.

***Issue One, Alternative Two - Allow purchasers to use Direct Mail Form for direct mail. If the purchaser does not use the Direct Mail Form for purchases of direct mail, the sale must be sourced by the seller under Rule 3.***

#### 1. Seller

- Purchasers giving a Direct Mail Form will relieve the seller of any burden to collect tax. However, if none is given, it is simple to source the transaction to the single billing address.
- Customer and audit issues may arise over the "bad faith" exception to Rules 3 and 4. Sellers may be required to reject a customer's superficial attempt to shift their business address to a state without a sales or use tax. If sellers do not reject such attempts, they may have a liability upon audit.

#### 2. Purchaser – The purchaser makes the call on whether it wants the seller to retain the burden of remitting the tax. This allows the purchaser to apply consistent tax treatment for all print purchases.

### 3. State/SSTP

- States will not have to make subjective determinations on whether a printer does or does not have sufficient information of destination addresses so that they know whether to apply Sourcing Rule 2 or 3 to direct mail. Without a Direct Mail Form, Rule 3 will always apply.
- The billing address is easy for a state to determine.
- Disputes could arise over superficial attempts to switch business addresses to a state without a sales or use tax. The states will have to determine whether the seller's acceptance of such attempts constitutes bad faith.
- A state may collect revenue even though the property never comes into the state.

- If a Direct Mail Form is used, a taxing jurisdiction may not always have the authority to impose a sales or use tax on the purchaser of direct mail that is ultimately delivered into the jurisdiction. Reasons for this lack of authority are:
  - The purchaser does not have nexus in the taxing jurisdiction.
  - Even if a purchaser does have nexus in a taxing jurisdiction, the taxing jurisdiction does not have a statutory definition of use that allows it to impose tax on property delivered into the taxing jurisdiction where the purchaser has not had physical possession of the property (See Appendix A).
- For transactions that must be sourced to the billing address because a Direct Mail Form is not given by the customer, several states will see little change from existing law because they have an exemption for certain printed and promotional material that is shipped outside the state for use outside the state (e.g., California, Connecticut, Kentucky, Maine, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin).

***Issue One, Alternative Three - Require purchasers to provide Direct Mail Form or delivery information to seller. If the purchaser does not provide the Direct Mail Form or delivery information, the tax is collected by the seller using Rule 5.***

#### 1. Seller

- Purchasers giving a Direct Mail Form will relieve the seller of any burden to collect tax. Purchasers giving delivery information eliminate uncertainty by a seller of where delivery takes place. However, if none of the required information is provided by the purchaser, it is simple to source the transaction to the location from where the direct mail was shipped (origin).
- Customer and audit issues may arise over the "bad faith" exception to Rules 3 and 4 if a clear default rule is not put in place. Sellers may be required to reject a customer's superficial attempt to shift their business address to a state without a sales or use tax. If sellers do not reject such attempts, they may have a liability upon audit.

#### 2. Purchaser

- The purchaser makes the call on whether it wants the seller to retain the burden of remitting the tax by giving the seller delivery information. This allows the purchaser to apply consistent tax treatment for all print purchases.
- There is some risk to purchaser for failing to provide the required information. Although the state of origin receives the tax, a tax may still be due in the state of delivery. If the state of delivery is not required to give credit for tax paid to the origin state, the purchaser must go to the state of origin for a refund or face overpayment of tax.

### 3. State/SSTP

- States will not have to make subjective determinations on whether a printer does or does not have sufficient information of destination addresses so that they know whether to apply Sourcing Rule 2 or 3 to direct mail. Without the required information, Rule 5 will always apply.
- The origin is easy for a state to determine.
- There is an incentive for the purchaser to provide the Direct Mail Form or delivery information.
- If a Direct Mail Form is used, a taxing jurisdiction may not always have the authority to impose a sales or use tax on the purchaser of direct mail that is ultimately delivered into the jurisdiction. Reasons for this lack of authority are:
  - The purchaser does not have nexus in the taxing jurisdiction.
  - Even if a purchaser does have nexus in a taxing jurisdiction, the taxing jurisdiction does not have a statutory definition of use that allows it to impose tax on property delivered into the taxing jurisdiction (See Appendix A).

#### ***Issue One, Alternative Four - Mandate use of Direct Mail Form for purchases of direct mail***

##### 1. Seller

- The seller is always relieved of collecting sales or use tax on sales of direct mail. However, without a default rule in the event of the purchaser not providing the required Direct Mail Form, it is not clear of what liability a seller will have. If it does have a liability to collect, it is not clear which rule should be used.
- Eliminates the potential liability for a "bad faith" use of default Rule 3 or 4.

##### 2. Purchaser

- For some purchasers, this may be advantageous, as they prefer to be solely responsible for reporting tax liability directly to the taxing jurisdiction. They feel this gives them certainty that they are not paying more than their fair share.
- Some purchasers like the fact that the seller remits the tax on their behalf, relieving them of some administrative burden self-reporting would require.

##### 3. State/SSPT

- Other sellers will wish to have their collection burdens removed as well.
- Eliminates potential disputes upon audit about a "bad faith" use of default Rule 3 or 4.

- A taxing jurisdiction may not always have the authority to impose a sales or use tax on the purchaser of direct mail that is ultimately delivered into the jurisdiction. Reasons for this lack of authority are:
  - The purchaser does not have nexus in the taxing jurisdiction.
  - Even if a purchaser does have nexus in a taxing jurisdiction, the taxing jurisdiction does not have a statutory definition of use that allows it to impose tax on property delivered into the taxing jurisdiction if the purchaser did not have physical possession of the property (See Appendix A).
- Three states have enacted legislation that has the effect of Alternative 4, reducing or eliminating the printer's burden to collect tax on direct mail and shifting the burden directly to the purchasers. (See Appendix B)

***Issue Two, Alternative One – Define Direct Mail Broadly to All Tangible Personal Property***

1. Seller – Industries, in addition to printing, will benefit from simplification.
2. Purchaser – Purchasers of direct mail from industries other than printing may prefer to remit tax to the seller rather than have accounts payable staff remember to self-assess tax due.
3. State
  - Simplifies audits of other industries from a sales perspective, but audits of their customers may be more complex as a result.
  - Promotes equal treatment of like-transactions and consistency in the taxation of mass mailings.
  - Other industries may be more likely to support this proposal if their mass mailings are treated in the same manner.

***Issue Two, Alternative Two – Limit Direct Mail to Printed Material***

1. Seller
  - Not all printed material sent by direct mail will be treated the same. For example, if a product sample is sent along with the printed material, the item does not meet the definition of direct mail since it contains more than the printed material.
  - Other sellers may oppose this limitation since the same concerns raised by the printers (e.g., not retaining mailing lists to know destination) could be raised for items sold to customers for distribution by the seller to mass audiences.
2. Purchaser – Some common promotional items will be excluded from the special sourcing rules.

3. State

- It may be confusing for a state to differentiate between qualifying and non-qualifying products upon audit.
- Creates inconsistency in taxing like-transactions.

***Issue Two, Alternative Three – Limit Direct Mail to Printed Materials That May Contain Certain Other Tangible Personal Property***

1. Seller – Clearer guidelines to follow for all printed items sent by direct mail.
2. Purchaser - Clearer guidelines to follow for all printed items sent by direct mail.

3. State

- Clearer guidelines to follow for all printed items sent by direct mail.
- A few states strictly limit exclusions to collect or exemptions to printed material only.
- The Implementing states have already adopted a definitions of direct mail identical to this alternative for purposes of excluding from sales price certain delivery charges.

## APPENDIX A

### State Jurisdiction to Impose Use Tax on a Purchaser

**Example:** *Company A purchases catalogs from Company B, a printer. Company A directs Company B to deliver the catalogs via the U.S. Mail to recipients throughout the United States. Company A has nexus in every state. Company B has nexus in its home state only and sales of catalogs in that state are exempt from sales or use tax. Is Company A subject to use tax on its purchases of catalogs delivered to recipients in jurisdictions that have a sales or use tax?*

At least 25 states rely on the *D.H. Holmes* decision and impose use tax on tangible personal property used or distributed in the state when the seller is not required to collect that state's tax or for some other reason does not collect the tax. However, states are limited to imposing the tax on purchaser's that have nexus (a physical presence within their state). See *Quill Corp. v. North Dakota*, 504 US 298, 119 L Ed 2d 91. Sales to a company outside of the state that only mails printed materials into the state would not be taxed. In addition, there are several states that do not have the statutory authority to impose use tax on the purchaser (e.g., Illinois, Wisconsin).

In the case of *D.H. Holmes Co., Ltd. v. Shirley McNamara, Secretary of Revenue and Taxation of Louisiana* (Docket No. 87-267, May 16, 1988, 486 U.S. 24, 108 S.Ct. 1619), the U.S. Supreme Court affirmed a Louisiana Court of Appeals decision holding that imposition of Louisiana use tax on the value of direct-mail catalogs printed outside the state and mailed by a Louisiana retail store chain free of charge to selected Louisiana residents did not violate the Commerce Clause of the U.S. Constitution. Under Louisiana law, distribution constituted a taxable "use." Therefore, the argument that the use tax was a tax on the mere presence of goods within the state was without merit, according to the U.S. Supreme Court. Furthermore, the application of the tax satisfied the four-pronged test of *Complete Auto Transit* (430 U.S. 274 (1977)), because the state's taxing scheme was fairly apportioned, it did not discriminate against interstate commerce, the use tax was fairly related to state-provided services that facilitated the taxpayer's in-state sales, and the taxpayer's activity had a sufficient nexus (connection) with the taxing state.

A state, however, could revise its law to follow *D.H. Holmes*, thereby allowing it to at least collect use tax from purchasers with nexus in their state on purchases of the printed material stored, used, or consumed in the state.



## APPENDIX B

### States that Have Removed Printers' Burden to Collect Sales of Use Tax on Sales of Direct Mail

The states of Florida, Texas, and Tennessee have laws that excuse the printer from collecting tax on sales of printed material shipped to individuals. Florida and Texas both presume that tax is due and the printer must collect it unless the customer provides an exemption certificate. Tennessee law is less clear, but commercial printers are excused from collecting tax in some cases.

#### 1. Florida

Statutes § 212.06 (3) (b)1. A purchaser of printed materials shall have sole responsibility for the taxes imposed by this chapter on those materials when the printer of the materials delivers them to the United States Postal Service for mailing to persons other than the purchaser located within and outside this state. However, if all, or substantially all, of the printed materials will be delivered to persons in Florida, the printer remains obligated to collect the tax. It is presumed that all materials printed at a Florida printing facility are to be delivered within Florida. The printer must obtain a certificate from the purchaser pertaining to the delivery of the printed material to allow an exemption.

#### 2. Texas

Tax Code Ann. § 151.052 (d) A printer is relieved of the obligation of collecting the taxes imposed by this chapter on printed materials that are distributed by the United States Postal Service singly or in sets addressed to individual recipients, other than the purchaser. The printer is required to collect Texas tax on these materials unless the purchaser issues an exemption certificate to the printer. The certificate must contain the statement that the printed materials are for multistate use and that the purchaser agrees to pay all taxes to Texas that are due. The printer is also required to file a report with the state on such sales.

#### 3. Tennessee

Law § 67-6-203 -- Property used, consumed, distributed or stored.

(a) A tax is levied at the rate of six percent (6%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided, that there shall be no duplication of the tax.

(b) A tax, which shall be paid by the distributor, is also levied at the rate set out in subsection (a) on the value of catalogues, advertising fliers, or other advertising publications distributed to residents of Tennessee; provided, that this tax shall not be duplicative of a sales or use tax otherwise collected on such publications. "Distributor" does shall not include the commercial printer or mailer of any such catalogues, advertising fliers, or other advertising publications; nor shall nexus to a taxpayer be established through a relationship with a commercial printer or mailer having a presence in Tennessee; nor shall the commercial printer or mailer have the obligation of collecting any such tax.